

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD SENTELL BROOMFIELD,

Defendant-Appellant.

UNPUBLISHED

April 8, 2014

No. 314353

Calhoun Circuit Court

LC No. 12-002954-FH

Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (sexual penetration of a person at least 13 but less than 16 years of age). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison term of 22 to 40 years. Defendant appeals as of right. We affirm defendant's convictions but remand for resentencing.

The victim testified that she first met defendant in September 2009 when she was living with her cousin. Defendant, the cousin's boyfriend, also lived in the home. The victim testified regarding three separate acts of sexual misconduct that occurred in the home between her and defendant, all before her 16th birthday. The first act occurred on a morning in September 2009 when defendant rubbed his hands on the victim's breasts and vagina, over her clothing. When the victim resisted, defendant told her to "quit playing." The second act occurred on October 10, 2009. The victim awoke to find defendant touching her. During this encounter, defendant performed cunnilingus on the victim before she was able to twist her body away. The last act occurred on October 19, 2009, when the victim performed fellatio on defendant. The victim alleged that defendant took photographs of this last encounter with his cellular telephone, and that she was kicked out of her cousin's home after her cousin discovered the photographs. Despite defendant's attempt to establish that the sexual contact between him and the victim all occurred after she turned 16 years old, defendant was convicted of two counts of CSC III stemming from the October 10 and October 19 acts involving penetration.

Defendant first argues that the trial court erred in allowing the introduction of other acts testimony by another minor, A.B, under MCL 768.27a. A.B. testified that she was 14 years old in June 2012 when she was babysitting the daughter of the victim's cousin at the cousin's home. While A.B. was in the kitchen preparing food, defendant grabbed a fork and poked the handle

into A.B.'s vaginal area. Defendant later grabbed A.B., pulled her into a bedroom, and shut and locked the door. He fondled A.B. on the buttocks and vaginal area over her clothing. As he was doing so, defendant told A.B. to "stop playing." A.B. was eventually able to push defendant away and escape the room. Defendant argues that the above testimony was not relevant to the issues at trial because he did not deny that sexual acts occurred between him and the victim but, rather, he denied that the acts occurred before the victim's 16th birthday. He also argues that the probative value of the evidence was substantially outweighed by its prejudicial nature. We disagree.

We review a trial court's decision whether to admit evidence for an abuse of discretion, but review preliminary questions of law, such as whether a rule of evidence precludes admissibility, de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

MCL 768.27a provides that

in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

Here, defendant was charged with committing two counts of CSC III, a "listed offense" under MCL 768.27a. MCL 768.27a(2)(a); MCL 28.722(k), (w)(iv). Moreover, the alleged act committed by defendant against A.B. also constitutes a "listed offense" because it could be classified as CSC IV. MCL 768.27a(2)(a); MCL 28.722(u)(ix). Accordingly, the other acts testimony was admissible "for its bearing on any matter to which it [was] relevant[.]" including defendant's propensity to commit the charged crime. MCL 768.27a; *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that defendant committed other sexual acts against a 14-year-old female makes it more probable that he committed sexual acts with the victim before she was 16 years old; in other words, it tends to negate defendant's contention that he would not perform these acts on a minor. Moreover, the testimony of A.B., a prior victim of defendant's sexual misconduct upon a minor less than 16 years of age, supports both the credibility of the victim's allegations here and tends to show that defendant more probably than not committed the crimes. As such, the testimony was relevant under MRE 401. See *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010).

In *Watkins*, 491 Mich at 481, our Supreme Court ruled that "evidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403 if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence.” MRE 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. In the context of MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value, rather than its prejudicial effect:

Yet were a court to apply MRE 403 in such a way that other acts evidence in cases involving sexual misconduct against a minor was considered on the prejudicial side of the scale, this would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant’s character and propensity to commit the charged crime. To weigh the propensity inference derived from other acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a.

Accordingly, when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect. That is, other acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference. [*Watkins*, 491 Mich at 486–487.]

In this case, the trial court did not abuse its discretion by admitting the contested evidence under MCL 768.27a. Evidence that defendant had previously engaged in over-the-clothes touching with a similarly aged minor girl in the cousin’s home and uttered the words “quit playing” when she attempted to resist, at a time close in proximity to the acts in the present case, was highly probative, as it showed that defendant had a propensity to commit similar acts of sexual misconduct against similar victims, see *Watkins*, 491 Mich at 486, 487. Moreover, the prejudicial effect of the evidence was minimized by the trial court’s limiting instruction to the jury. *People v Crawford*, 458 Mich 376, 399 n 16; 582 NW2d 785 (1998) (“[A] limiting instruction will often suffice to enable the jury to compartmentalize evidence and consider it only for its proper purpose. . . .”); *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (“Jurors are presumed to follow their instructions.”). Thus, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence.

Defendant next argues the trial court erred in scoring 50 points for offense variable (OV) 11 of the sentencing guidelines. The prosecutor not only concedes that the trial court erred in scoring 50 points for OV 11, but also concedes that OV 11 should have been scored at zero points.

The sentencing information report completed for defendant’s sentencing calculated defendant’s total OV score to be 95 points (Level VI), and his total PRV score to be 95 points (Level F), MCL 777.63. The recommended minimum sentencing range for an habitual offender,

fourth offense, with a total OV score of 95 points and a total PRV score of 95 points is 117 to 320 months. MCL 777.63; MCL 777.21(3)(c). When OV 11 is reduced from 50 points to zero points, defendant's total OV score is reduced to 45 points (Level IV). MCL 777.63. The recommended minimum sentencing range for an habitual offender, fourth offense, with a total OV score of 45 points and a total PRV score of 95 points is 87 to 290 months. MCL 777.64; MCL 777.21(3)(c). "Because defendant's sentences are predicated upon an inaccurate calculation of the guidelines range, defendant is entitled to be resentenced." *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006), citing *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006).

We affirm defendant's convictions but remand the case to the trial court for resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey